## STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 94B031

CCRD Charge No. S94GY001

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# INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAMELA D. ENGNINGED

PAMELA B. ENSMINGER,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION, UNIVERSITY OF NORTHERN COLORADO, UNIVERSITY BOOK STORE,

Respondent.

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Hearing was held on January 26 and April 7, 1995 in Greeley, Colorado before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Robin R. Rossenfeld, Assistant Attorney General. Complainant represented herself throughout the proceedings until the commencement of the second and concluding day of hearing, at which time attorney Julie C. Hoskins entered her appearance on behalf of Complainant, who also appeared.

Respondent's witnesses were: Complainant; Thomas Sherwood, former Assistant Director of Stores; Kaye Susemihl, Book Store Merchandise Manager; Martha Fluke, General Book Department Manager; Linda Wonenberg, Book Store Text Book Manager; and Dennis Hayzlett, Director of Personnel Services, University of Northern Colorado.

Complainant's witnesses were: Sherry May, former employee, University of Northern Colorado; Kaye Susemihl, Merchandise Manager; Steve Collins, Teaching Assistant; Candy Langford, Office Manager, Career Services; Irma Mitchell, former Book Store Supervisor (by telephone); Sarah Castillo, former student and Book Store Cashier (by telephone); Sandra Varley, Psychotherapist who

was certified at hearing as an expert in depression; Annette Wiemers, Administrative Assistant; Madeline Lovato, friend of Complainant; Judy Kersten, Program Assistant, Student Health Center; and Katy Ensminger, former book store employee and Complainant's sister (by telephone). Complainant also testified in her own behalf.

Respondent's Exhibits 1, 2, 4, 5, 8 through 14, 16 through 23 and 29 were admitted into evidence without objection. Exhibits 3, 6, 7 and 15 were admitted over objection. Complainant's Exhibits C, G, H, I and F were admitted without objection. Exhibit B was admitted over objection. Exhibit D was offered but not admitted.

Administrative notice was taken of the finding of "no probable cause" of the Colorado Civil Rights Division in its investigation of Complainant's claim of discrimination.

## MATTER APPEALED

Complainant appeals her disciplinary termination and alleges discrimination on the basis of mental disability.

#### **ISSUES**

- 1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
- 2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
- 3. Whether Complainant was discriminated against on the basis of mental disability;
- 4. Whether Respondent is entitled to an award of attorney fees

and costs.

#### FINDINGS OF FACT

- 1. Complainant, Pamela Ensminger, was hired by the University of Northern Colorado (UNC) book store on May 12, 1975. She was certified in the position of Book Store Sales Clerk B (supply buyer) in the supply department of the book store at the time of the termination of her employment.
- 2. From 1975 through 1989, Complainant displayed some job deficiencies and performance problems, particularly in the areas of interpersonal relations, completion of duties and seemingly excessive use of sick leave. Overall, however, Complainant performed at an acceptable level during this period of time. (See Complainant's Exhibit C, performance appraisals.) The pertinent time frame with respect to Complainant's disciplinary termination is 1990 1993.
- 3. On May 10, 1990, Merchandise Manager Jeri Bray, Complainant's supervisor, issued a warning letter referencing an April 25 discussion between them regarding a complaint from the nursing department that Complainant had been rude with students and staff. The warning letter advised Complainant that this was not the first occurrence of Complainant's rude behavior toward customers or co-workers, and that such rude behavior would not be tolerated under any circumstances in the future. (Respondent's Exhibit 3.)
- 4. Kaye Susemihl began employment with the UNC book store in December 1987 as a book store clerk. She worked with Complainant as a peer until May 1990 when she became Merchandise Manager and Complainant's supervisor. Complainant was working under a

corrective action at the time Susemihl became her supervisor. This corrective action had been requested by Jeri Bray, whom Susemihl succeeded. Bray and Susemihl work together as supervisors for a period of two months until Bray's resignation. The general complaint from the nursing department was that Complainant was unwilling to work with some of the nursing students. She made an unauthorized phone call to the nursing department and said to not send those students over to the book store.

5. On May 15, 1990, by letter from Bray, Susemihl and Tom Sherwood, General Manager, Complainant was advised that the three of them were recommending a corrective action. Because this recommended corrective action set the stage that ultimately led to the disciplinary termination, the proposed corrective action, adopted and formally issued as a corrective action on May 16, is quoted below in full:

# RE: Request for University sanction for corrective action

After much work on a personal and professional level, it is now apparent that we have not achieved satisfaction in a change of work behavior. It is for this reason that we ask the personnel office to assist in a corrective action. The following will outline for us the behavior that must be achieved in the next 60 days. You will be given a written and oral evaluation of your progress in 30 days and a final evaluation in 60 days. You must successfully accomplish all of the behavior changes listed below to avert a disciplinary action.

## 1) CUSTOMER/EMPLOYEE RELATIONS

- a) Do not vent anger and frustration toward campus departments (ie calling nursing department to stop student from picking up uniforms or telling lab school teacher that the Bookstore will not place anymore orders for them because they didn't pick up a previous order) IMO purchases should be written up as needed with pricing information. This is not an interruption of your work, it is what you are expected to do.
- b) No independent action will be taken on the store's behalf

- such as the calls to the nursing department.
- c) Must maintain friendly and helpful attitude toward all customers at all times. Customers are always number one. All other tasks must be dropped and the customers' needs met. Do not continue working or act frustrated when a customer asks for help. (ie I'm never going to get my work done with all these interruptions. These interruptions are part of your work)
- d) Always greet customers in supply area. Do not ignore a customer or act like you are too busy to be interrupted. Speak to each customer who comes into your area.
- (e) Must maintain friendly and helpful attitude toward all Bookstore staff. Do not complain about time restraints and that no one can do it except you. Accept help from others when it is offered or ask for help if you need it.
- f) Supply any requested information in a friendly manner. (not I don't know or I don't have the time) Always find an answer and report it to the customer.

## 2) JOB RESPONSIBILITIES

- a) Purchase orders must by typed by a student assistant from an inventory control sheet. The inventory control sheet and the PO must be put in the typist's tray at the end of each day.
- b) All ordering must be done using the inventory control system.
- c) All new product selection will be done in conjunction with Kaye or with her approval. Vendors appointments will need to be scheduled on the lead time necessary for the acquisition of product. (ie imprinted products that need a longer time to manufacture)
- d) Backroom stock must be cleaned and organized per plan developed by you and merchandise manager. A letter of agreement about this plan will be issued by Kaye.
- e) Sales area must be well stocked and clean. (student help should be well utilized) Items received in the backroom must be on the shelf the same day.

## 3) PERFORMANCE EVALUATION

- a) Must meet with merchandise manager and the Bookstore manager on weekly basis to evaluate progress.
- b) Upon the first day of sick leave a doctors note must be obtained.
- ALL above work behaviors must be met for the corrective action to be halted. This means that 100% of these behaviors must be in the satisfactory range by the end of the 60 day period.

If all behaviors are meet (sic) and a positive attitude is maintained, you will have the opportunity for upgrade, a desk, and attending educational seminars. During this 60 day period these benefits will not be available.

(Respondent's Exhibit 4; <u>See also</u> Exhibit 5.)

- 6. On June 5, 1990, Kaye Susemihl, who had become Complainant's supervisor upon the resignation of Jeri Bray, received a memo from another department manager indicating that Complainant had been hostile toward a new employee. (Respondent's Exhibit 6.)
- 7. On June 18, 1990, Susemihl received another memo from the same manager indicating that Complainant had become hostile and defensive and made a "scene" over an alleged pricing error. (Respondent's Exhibit 7.)
- 8. On June 18, 1990, Susemihl issued to Complainant a 30-day unsatisfactory evaluation with respect to the corrective action. Susemihl noted that Complainant continued to have employee relationship problems, did not always process purchase orders in the required manner, did not keep adequate records of special orders, and was a half-hour late for scheduled meetings with her and Tom Sherwood. (Respondent's Exhibit 8.)
- 9. On August 1, 1990, Susemihl issued a 60-day overall evaluation of unsatisfactory in complying with the corrective action. Susemihl noted that, "customer/employee relations" was of "great concern" to her. (Respondent's Exhibit 9.)
- 10. By memo dated August 1, 1990, Susemihl requested that the 60-day corrective action be extended for an additional 60 days. Susemihl wrote, "Pam has been trying, and tho (sic) there has not

been satisfactory progress in the employee/customer relations area, I feel her efforts and length of employment demand I spend more time working with her." (Respondent's Exhibit 10.)

- 11. On November 29, 1990, Susemihl wrote a memo in which she stated that Complainant had made some improvement in the area of employee/customer relations and that Susemihl was very positive about the changes and progress Complainant was making. (Respondent's Exhibit 11.)
- 12. In her performance appraisal for the period December 1, 1989 through December 1, 1990, Complainant received an overall rating of Needs Improvement. Susemihl noted: "Pam has had a very hard year personally and at work. Her `people skills' have been a great concern, however I have witnessed in the last few weeks a very positive change. She is making a great effort and seems much happier. We are working to improve her `people skills' and I believe she is trying very hard." (Respondent's Exhibit 12.)
- 13. A corrective action was not issued for the 1990 Needs Improvement rating because of the previously enforced corrective action regarding the same issues. Because of the perception that progress was being made, the corrective action was removed. (Respondent's Exhibit 13.)
- 14. Complainant received an overall rating of Good on her performance appraisal for the period December 1, 1990 through December 1, 1991. (Respondent's Exhibit 14.)
- 15. Complainant received a Needs Improvement overall performance rating on her appraisal for the period December 1, 1991 through December 1, 1992. Susemihl noted: "Pam has had a hard year. There have been ongoing problems which are of great concern. I believe Pam has the ability to correct these problems if she

decides to do so. I want to support and encourage her to accept this evaluation as a learning opportunity and work to correct and improve the areas outlined." (Respondent's Exhibit 15.)

- 16. By memo dated December 1, 1992, Susemihl recommended that another corrective action be imposed because Complainant had not reached an acceptable work performance level. Susemihl outlined the improvements to be made. (Respondent's Exhibit 16.)
- 17. On December 4, 1992, based upon the Susemihl memo, Dennis Hayzlett, Director of Personnel Services, issued a 90-day corrective action as follows:
- As required under this rule you are placed on a corrective action for a period of ninety (90) calendar days beginning today, December 4, 1992. The purpose of this corrective action is to improve your job performance in the areas of: 1) Problem Analysis and Decision Making, 2) Planning, Organizing and Coordinating, 3) Organizational Commitment and Adaptability, 4) Communications, and 5) Interpersonal Relations as noted on your P.A.C.E. Planning and Evaluation form. Specifically, during the course of the correction action:
  - A.You must improve your job performance in all areas marked "Needs Improvement" on your P.A.C.E. evaluation form.

    Ms. Susemihl has provided specific performance comments in the memorandum to you dated December 1, 1992, that accompanied your evaluation. By the end of the corrective action period, your overall evaluation score must improve to "Good", 300 points.
  - B. Your performance during this corrective action will be evaluated by your supervisor, Ms. Susemihl.
  - C. Your performance during the corrective action will be evaluated against the same factors and standards utilized on your annual evaluation and as established by your job description (PC-8).
- At the end of the 90 day period you will meet with your supervisor for another PACE evaluation. If you are unable to improve the noted performance deficiencies

through this corrective action, disciplinary action up to and including termination of employment may be administered.

(Respondent's Exhibit 17.)

- 18. Complainant was treated by Sandra Varley, a licensed psychotherapist, from October 28, 1992 through December 8, 1993. Complainant originally contacted Varley for follow-up treatment after a six-day hospitalization for major depression in October.
- 19. Complainant, her sister and her mother all suffer from depression. Complainant has been treated with various medications, some of which have not been effective. Depressive episodes can be triggered by any significant loss, such as a relationship or a job, or can be triggered by stress. (See Complainant's Exhibit F, "Treatment Summary".) Complainant blames Susemihl for causing her stress.
- 20. Complainant testified that her medications have the side effect of anxiety, and that in the past five years she has had five different medications prescribed for her. She has been on the same medication since November 1993.
- 21. By memo dated April 1, 1993 from Susemihl to Dennis Hayzlett, Director of Personnel Services, Susemihl noted that Complainant's performance was acceptable in the areas of Customer/Vendor/Employee Relations, Job Responsibilities, and Performance Evaluation.

(Respondent's Exhibit 18.)

- 22. Hayzlett removed Complainant from the corrective action of December 4, 1992 on April 7, 1993. (Respondent's Exhibit 19.)
- 23. During the periods of the corrective actions, Complainant's

job performance improved. During the periods when the corrective actions were no longer in force, her job performance deteriorated and the problems that the corrective actions were designed to resolve reappeared.

- 24. Susemihl met with Complainant on numerous occasions to discuss her duties and responsibilities as well as performance deficiencies. Complainant tended to blame others, especially student workers, and generally denied responsibility for incomplete tasks. Complainant would at times indicate that she was making a genuine effort to change and improve, and this gave Susemihl reason to believe that progress was being made.
- 25. Susemihl observed that Complainant's behavior caused a hostile work environment. Other employees feared communicating with Complainant because of their perception that she would "come unglued". Susemihl and Complainant had many discussions concerning interpersonal relations.
- 26. Susemhil talked to Complainant's therapist twice by phone concerning Complainant's condition and the effects of medication. She also read information which Complainant had provided her pertaining to depression. However, Susemihl was not offered specific suggestions on how to help Complainant improve her job performance.
- 27. Susemihl offered to relieve Complainant of some of her buying duties, or of supervising students, but Complainant declined the offer.
- 28. Complainant had frequent absences, especially during the times of year when the book store was at its busiest. It is for this reason that the May 1990 corrective action required a statement from the doctor for days when Complainant was ill. It

is also the reason that Susemihl implemented the concept of "team buying", whereby two people, rather than just one, would have the necessary information. Complainant was never denied sick leave for failure to bring in a doctor's statement.

- 29. Because buyers did not have sufficient time to type the purchase orders and fulfill their other functions, Susemihl directed that students would be the only ones to type purchase orders. However, Complainant continued to do this on her own. By the start of the summer 1993, Susemihl found forty to fifty purchase orders that were checked off as being typed but had not in fact been typed. Complainant stated that she intended to type them but had not gotten it done. Meanwhile, the receiving department was getting in books and did not have a purchase order to match them, so the books did not move. There were two days in July 1993 when Complainant was out sick and had purchase order information at home which was needed in the book store.
- 30. Susemihl discussed these matters with two other managers and with her direct supervisor in an effort to find a way to resolve all of the problems that she perceived Complainant was causing. Over a period of three years the situation had not changed, in Susemihl's view, despite substantial efforts on her part and others. She saw the ongoing performance problems were becoming destructive to the book store.
- 31. Kaye Susemihl has the reputation of being a fair supervisor who makes extended efforts to help employees succeed on the job.
- 32. There are a number of book store customers who feel that they received high quality service from Complainant and that she was very helpful to them, especially prior to 1990. Complainant's supervisor for twelve years prior to 1990 was generally satisfied with the work performed and would recommend her for employment

elsewhere. The former supervisor, who retired from the book store in 1989, testified that Complainant was very nice and was helpful to customers, and that members of the faculty liked her. The supervisor testified that Complainant was "a little bit slow" and that absenteeism was a problem.

- 33. Complainant described herself as a "basketcase" and "incredibly irritable" around the time of her hospitalization in 1992. Complainant described herself as "non-functional" when she gets "really depressed". According to Complainant, she was diagnosed with major depression in 1983.
- 34. By memo dated July 22, 1993, Kaye Susemihl advised Dennis Hayzlett that Complainant's job performance was again having an adverse effect on other staff members and on the smooth operation of the book store. Referring to her memo of December 1, 1992, Susemihl outlined the problem areas as follows:

## 1) CUSTOMER/VENDOR/EMPLOYEE RELATIONS

- a) Complaints by vendors and store employees of Pam's anger and frustration which seems vented at them.
  - b) Not meeting customer needs. Complaints from other departments about Pam when she is on the floor alone, not being willing to wait on customers, forcing the other departments to take care of the customer.
  - c) Negative attitude which is destructive among student and full time staff. Constant complaints of other's mistakes, unfriendliness and unwillingness to work with staff to resolve problems in a constructive and timely manner.

### 2) JOB RESPONSIBILITIES

- a) Purchase order information not given to students to type in timely manner or not at all. Purchase orders not completed to meet deadlines.
- b) Purchase order information not available to staff to type in her absence. (Information taken home, which she had been asked several times not to do)

- c) Purchase orders recorded by Pam in purchase order log as completed when they were not.
- d) Taking no responsibility for back room or floor stock orderliness, cleanliness or stocking.
- e) Unwillingness to help train student employees
- f) Defectives and returns not cleared monthly.
- g) Unwillingness to cooperate with policies set for her and the department.

(Respondent's Exhibit 20.)

- 35. By memo dated August 3, 1993, Susemihl advised Complainant that her job performance had dropped below an acceptable level. Susemihl outlined the same areas of poor performance as she had in the memo to Hayzlett, again referring to the December 1, 1992 memo. Susemihl advised Complainant that she would request that a disciplinary action be imposed. (Respondent's Exhibit 21.)
- 36. Dennis Hayzlett has been delegated appointing authority for personnel actions by the University president. Hayzlett had been in frequent contact with Kaye Susemihl concerning Complainant's job performance. Hayzlett was familiar with the alleged problems and with the corrective actions. When he received Susemihl's July 22, 1993 memo, Hayzlett viewed it as demonstrating a recurrence of the problems of the past.
- 37. Hayzlett conducted an R8-3-3 meeting on August 5, 1993. Just he and Complainant were present. The meeting lasted for one and one-half hours. The purpose of the meeting from Hayzlett's point of view was to hear Complainant's account of events. Complainant stated that she was working hard to improve her attitude. She felt that she did not get the necessary information and supervision from Kaye Susemihl. She stated that Susemihl was not aware of her hard work and that she helped in other areas beyond her job description. She stated that she took work home with her in order to get it done so the purchase orders could be issued. Complainant thought some students were inattentive to their duties

and this caused more work for her. She felt there was a lack of cooperation from other employees. Complainant stated that her medication sometimes was not effective, which contributed to her anger on the job. Hayzlett asked Complainant if there was any other information he should consider, or if there were other witnesses she would have him interview. She did not provide She did not tell Hayzlett that anything further. diagnosed as clinically depressed. She did tell him that when she changed medications the change would affect her behavior. Complainant did not make any suggestions or requests to improve her work situation. She did not request reasonable accommodation based upon having a disability.

- 38. Hayzlett asked Merna Jacobsen, Director of Organizational Development, who is trained as a mediator, to meet with Complainant and Susemihl to determine whether the problems and differences between them could be resolved. The mediator determined that mediation would not be helpful in resolving the issues. Hayzlett also talked to Susemihl's supervisor.
- After a complete review of Complainant's personnel file, consisting of more than one hundred documents, Hayzlett determined that termination was the appropriate action. The basis of his decision was that Complainant's job performance problems were There were two corrective actions for the same type of behavior and, although her performance would improve during the period of the corrective actions, her performance would deteriorate thereafter. Hayzlett was mindful of Complainant's years of service at UNC and of her good qualities. Hayzlett noted that Complainant had received two Needs Improvement PACE ratings since 1990, and that a third corrective action should have been issued for the second Needs Improvement rating but was not because she had just completed a separate corrective action for the same performance issues.

40. Hayzlett concluded that Complainant's job performance deficiencies had a negative impact on the operation of the book store and terminated her employment effective August 13, 1993. (Respondent's Exhibit 22.)

#### **DISCUSSION**

In this <u>de</u> <u>novo</u> disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts omissions on which the discipline was based occurred and that just exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse Respondent's action only if the action is found arbitrary, capricious or contrary to rule or law. Sec. 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B). Complainant bears the burden to prove by preponderant evidence that discriminated against.

The Americans With Disabilities Act (ADA) requires state and local governmental entities to make all programs, services employment accessible to disabled persons. The Act defines a person with a disability as: 1) a person with a physical or mental impairment that substantially limits a major life activity; 2) a person with a record of such physical or mental impairment; or 3) a person who is regarded as having such an impairment. U.S.C. sec. 12102(2). "Substantially limits" means that a person significantly restricted unable to perform, oris performing, a major life activity that an average person can perform. 29 C.F.R. 1630.3(j)(1)(1992).

The ADA prohibits discrimination against "qualified individuals with disabilities". Employees are qualified for protection if they: 1) satisfy the prerequisites of the position by possessing

the appropriate education, employment experience, skills, licenses and the like; and 2) they can perform the essential functions of the position, with or without reasonable accommodation. 42 U.S.C. sec. 12111(8); 29 C.F.R. 1630.2(m). The determination regarding the employee's qualifications should be based on the persons's capabilities at the time the employment decision is made. <u>See Chiari v. City of League City</u>, 920 F.2d 311 (5th Cir. 1991).

Employers must provide reasonable accommodation to qualified individuals with a disability. 29 C.F.R. 1630.9. Reasonable accommodation is a "change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." obligated 1630.2(o). Employers are to make reasonable accommodation only to employees with known disabilities. Id. disabled individual must inform the employer that an accommodation is necessary, unless such is obvious, and the employer may require documentation of the need for an accommodation. Id. need not eliminate or reallocate essential job functions. Employers need only provide an accommodation which enables the employee to perform the essential duties of the job, necessarily the accommodation of the employee's choice. 1630.9(d).

Complainant's initial burden is to establish a <u>prima facie</u> case of discrimination by showing by a preponderance of the evidence:

1) that she belongs to the protected class (person with a disability); 2) that she was otherwise qualified to perform the duties of the position; and 3) that an adverse action was taken against her because of the disability. <u>See McDonnell Douglas Corp. v. Green</u>, 411 U.S. 792 (1973).

Once Complainant meets her initial burden, Respondent must rebut the presumption of discrimination by setting forth non-

discriminatory justifications for the allegedly discriminatory practice. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Then Complainant is afforded the opportunity to show by preponderant evidence that Respondent's asserted business reason is a mere pretext for unlawful discrimination. McDonnell Douglas, supra. Ultimately, Complainant must prove that Respondent's action was the result of intentional discrimination.

St. Mary's Honor Center, et al. v. Hicks, 509 U.S. , 113 S.Ct. 2742 (1993).

In the present matter, Complainant did not establish that she is a person with a disability under the ADA. While she has a record of depression, she did not establish that this impairment substantially limits a major life activity. The agency never regarded Complainant as a disabled person. Complainant was perceived as a person with a problem, not a person with a She did not hold herself out as a person with a disability. She did not suggest or request accommodation in the context of her qualifications to perform the essential duties of the position. To the extent that her depression would cause her to become "dysfunctional", testified, she would not be otherwise qualified to perform the duties of the position. She did not testify to frequency and duration. There is a difference between "impairment" "disability". Impairment is a medical term. Disability explains a legal conclusion. An impairment is not considered a disability unless it is severe enough to cause a substantial limitation on a major life activity, including caring for oneself, walking, seeing, hearing, speaking, breathing, learning and working. person is substantially limited if she cannot perform, or is

<sup>&</sup>lt;sup>1</sup> Nor would she be "otherwise qualified" to the extent that her condition prevented her from being courteous or caused her to be disruptive.

limited in her ability to perform, a major life activity. An employer's concern is whether the employee is substantially limited as to the major life activity of working. Complainant did not produce sufficient evidence to show this to be the case and, in fact, did not make the argument. See Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994). During her testimony, Complainant displayed a selective memory and was evasive. She failed altogether to prove that Respondent intentionally discriminated against her on the basis of a disability. St. Mary's Honor Center, supra.

The outcome of this case is the same under state law as it is under federal law. Employment discrimination on the basis of a disability is prohibited by the Colorado Unfair Employment Practices Act, sec. 24-34-401, et. seq., C.R.S. (1994 Cum. Under this statute, in order to establish a case of discrimination because of a disability, Complainant has the burden to show that she is disabled, that she is otherwise qualified for the job, and that she was terminated or otherwise suffered an adverse employment action as a result of her disability. Colorado <u>Civil Rights Commission v. North Washington Fire Protection</u> District, 772 P.2d 70 (Colo. 1989). If Complainant makes this showing, then the employer must demonstrate that there is no reasonable accommodation that can be made, that the disability actually disqualifies the individual from the job, and that the disability has a significant impact on the job. If the employer offers credible evidence that reasonable accommodation is not possible, Complainant must next show that her particular capabilities allow her to perform the job and other possible accommodations exist. Civil Rights Commission v. North Washington Fire Protection District, supra. To be "otherwise qualified" means that the person is able to meet all of the requirements of the job in spite of a disability. <u>Id</u>. A disabled person is otherwise qualified if, with reasonable accommodation, she can

perform the essential functions of the job. <u>See</u> Civil Rights Division Rule 60.2 Sec. B, 3 Code Colo. Reg. 708.1 (1994). A disabled person must meet those requirements that are reasonable, legitimate and necessary. <u>AT&T Technologies, Inc. v. Royston</u>, 772 P.2d 1182 (Colo. App. 1989). <u>See also</u> <u>Coski v. City and County of Denver</u>, 795 P.2d 1364 (Colo. App. 1990).

The record, here, reflects that Complainant was terminated from her position for ongoing and continuing performance deficiencies which impacted adversely on the operation of the UNC book store. Her supervisor, and finally the appointing authority, fairly considered her length of employment and the good qualities she had shown in the past before the recommendation and decision were made, respectively. Over a period of three years, the supervisor worked closely and in an understanding and positive manner with Complainant to upgrade Complainant's job performance. supervisor wanted her to succeed. Complainant received abundance of notice of the areas in which improvement required. Complainant proved that she was capable of performing acceptably at times, but did not do so consistently. The concept of "progressive discipline" was followed. In the end, appointing authority was able to exercise the option disciplinary termination without abusing his discretion. administrative law judge is not convinced that he is better suited to exercise the responsibilities of personnel management than is the appointing authority who terminated Complainant's employment. Chiappe v. State Personnel Board, 622 P.2d 527, 534 (Colo. 1981).

## CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.

- 2. The discipline imposed was within the range of alternatives available to the appointing authority.
- 3. Complainant was not discriminated against on the basis of a mental disability.
- 4. Neither party is entitled to an award of attorney's fees.

#### ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_\_ day of
May, 1995, at
Denver, Colorado. Ac

Robert W. Thompson, Jr. Administrative Law Judge

## CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of May, 1995, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Julie C. Hoskins
Attorney at Law
Houtchens, Daniel & Greenfield
1007 Ninth Avenue
Greeley, CO 80631

and in the interagency mail, addressed as follows:

Robin R. Rossenfeld
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

### **NOTICE OF APPEAL RIGHTS**

# **EACH PARTY HAS THE FOLLOWING RIGHTS**

1.To abide by the decision of the Administrative Law Judge ("ALJ").

2.To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

#### RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is \$50.00. The estimated cost to prepare the record on appeal in this case with a transcript is \$1,292.00. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

#### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

#### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

#### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for

reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.